

TAB 101

Roxane Laboratories, Inc (James F. McIntyre)
Chicago, IL

February 26, 2009

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UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

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In Re: PHARMACEUTICAL)
INDUSTRY AVERAGE WHOLESALE) MDL No. 1456
PRICE LITIGATION) Civil Action No.

-----X 01-12257-PBS

THIS DOCUMENT RELATES TO:)
United States of America ex)
rel. Ven-a-Care of the)
Florida Keys, Inc., et al.)
v. Boehringer Ingelheim)
Corp., et al., Civil Action)
No. 07-10248-PBS)

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The videotaped 30(b) (6) deposition of
Roxane Laboratories, Inc., Roxane Laboratories, Inc.
n/k/a Boehringer Ingelheim Roxane, Inc., Boehringer
Ingelheim Pharmaceuticals, Inc., and Boehringer
Ingelheim Corporation by JAMES F. MCINTYRE

Chicago, Illinois

Thursday, February 26, 2009

Roxane Laboratories, Inc (James F. McIntyre)

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8 (Pages 26 to 29)

26		28
1 Q. Take a moment to review. You can let me 2 know when you're ready for a couple questions. 3 A. I'm ready.	1 Q. -- "Restructure?" 2 A. -- "Restructure?" Sorry. 3 MS. RIVERA: It's okay.	
4 Q. Have you seen this document before? 5 A. Yes.	4 BY THE WITNESS: 5 A. "We currently operate" -- what -- I'm 6 sorry, which paragraph again?	
6 Q. Who is Hermann Tetzner? 7 A. Hermann Tetzner at this time was the 8 chief financial officer of BIC.	7 BY MR. FAUCI: 8 Q. It's the paragraph beginning with, "We 9 currently operate."	
9 Q. Do you know if he had responsibilities on 10 behalf of BIPI?	10 A. "We currently operate in the U.S. with a 11 variety of legal entities that do not necessarily 12 reflect the nature of our business. This results 13 in two sets of reporting: One in terms of legal 14 entities and another in terms of business."	
11 A. Well, he's chief financial officer for 12 BIC, so as a part of the corporate parent company, 13 yes.	15 Q. How did the Boehringer Ingelheim 16 companies report, quote, "in terms of legal 17 entities," quote?	
14 Q. Would that have included Roxane, his 15 responsibilities?	18 A. Could you clarify the question? I'm not 19 quite sure.	
16 MS. RIVERA: Object to form.	20 Q. I'm not quite sure what it means either. 21 I'm -- I'm reading the -- I'm sure what the 22 question means.	
27		29
1 A. Yes.	1 A. Well, all of our operating units are 2 separate legal entities, so each one reported 3 separately.	
2 Q. Can you read that first paragraph.	4 Q. I'm looking at this -- well, let's maybe 5 take a step back. When was the first time you saw 6 this document?	
3 A. "The current legal and operational 4 structure of the U.S. business has evolved over 5 time and served well for a long period" --	7 A. I don't recall whether I saw this back at 8 the time of the project or not, but certainly 9 during the course of preparing for this deposition 10 I've seen it.	
6 MS. RIVERA: Hold on. Hold on.	11 Q. Does this appear to be a presentation 12 that Mr. Tetzner made?	
7 BY MR. FAUCI:	13 A. That's what it appears to be, yes.	
8 Q. I'm sorry, we're on different pages of 9 the document. If you go to --	14 Q. And the language you just read, he says - 15 - or the slide says, "We currently operate in the 16 U.S. with a variety of legal entities that do not 17 necessarily reflect the nature of our businesses.	
10 MS. RIVERA: Did you mean the second 11 slide --	18 This results in two sets of reporting: One in terms 19 of legal entities and another in terms of 20 businesses." Do you see that?	
12 MR. FAUCI: Yes, the very first --	21 A. Yes.	
13 MS. RIVERA: -- on the first page?	22 Q. I'm trying to understand what -- what's	
14 BY THE WITNESS:		
15 A. All right.		
16 BY MR. FAUCI:		
17 Q. The very first page --		
18 A. Sorry.		
19 Q. -- the second slide --		
20 A. Sorry.		
21 Q. -- under the heading, "Why" --		
22 A. "Why" --		

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<p>1 the difference between a -- a reporting that is in 2 terms of legal entities as opposed to reporting in 3 terms of businesses?</p> <p>4 A. Well, Roxane Laboratories is a legal 5 entity. But the sales is sales and marketing, and 6 -- and the operations piece is a manufacturing. We 7 report separately in terms of -- of the -- the 8 performance results for those two segments of that 9 particular company, so we really had two businesses 10 within that one legal entity. And that's what the 11 organization was trying to -- reorganization was 12 trying to fix.</p> <p>13 Q. Why was this regarded as something that 14 needed to be fixed?</p> <p>15 A. The -- the manufacturing business, who 16 was -- the COO was Rob Fromuth, reported directly 17 to the CEO of the U.S.</p> <p>18 Q. Mr. Fromuth was a Roxane employee?</p> <p>19 A. Yes.</p> <p>20 Q. And who did he report to?</p> <p>21 A. Marti Carroll, CEO of the U.S. of BIC.</p> <p>22 Q. CEO -- CEO of BIC?</p>	<p>1 Q. When did Marti Carroll become the CEO of 2 BIC?</p> <p>3 A. End of 2002 or early 2003, I'm not sure.</p> <p>4 Q. Do you know who's -- who his predecessor 5 was?</p> <p>6 A. Werner Gerstenberg.</p> <p>7 Q. And so prior to, when Mr. Gerstenberg was 8 CEO of BIC, would Tom Russillo have reported to him 9 then?</p> <p>10 A. Yes, I would suspect so.</p> <p>11 Q. The second paragraph reads, "This system 12 often does not convey clearly the performance of 13 our businesses and leads to complexity in 14 interpreting how each business is faring. The 15 accounting reconciliations between the legal 16 entities and the businesses reduce but do not 17 remove this complexity." Do you see that?</p> <p>18 A. Yes.</p> <p>19 Q. What is an accounting reconciliation?</p> <p>20 A. To identify -- basically identifying the 21 costs that are related to the marketing side of the 22 business versus the manufacturing side of the</p>
31	33
<p>1 A. Yes. And he was responsible for 2 operations, our manufacturing.</p> <p>3 Q. I believe the question I had asked 4 earlier was: Why was this situation regarded as a 5 problem that needed to be fixed?</p> <p>6 A. Well, the sales and marketing side of the 7 business, who was the vice president or general 8 manager of the -- the -- the multi-source or the 9 generic business for Roxane Laboratories, reported 10 to someone different.</p> <p>11 Q. Who was that person? Who -- who was the 12 person in charge of the marketing and sales of 13 Roxane Laboratories?</p> <p>14 A. Paul Kersten.</p> <p>15 Q. When was Mr. Kersten in charge of that?</p> <p>16 A. Oh, at least since 2001. I don't know if 17 it goes back any further than that.</p> <p>18 Q. And who did he report to?</p> <p>19 A. He reports to -- at that time, 2001, Tom 20 Russillo.</p> <p>21 Q. Do you know who Mr. Russillo reported to?</p> <p>22 A. Marti Carroll.</p>	<p>1 business.</p> <p>2 Q. What do you mean, "identifying"?</p> <p>3 A. I'm sorry?</p> <p>4 Q. Can you clarify what you mean by 5 "identifying the" --</p> <p>6 A. If we --</p> <p>7 Q. -- "costs"?</p> <p>8 A. -- want to separate, we can identify 9 which costs go with the sales -- sales side of the 10 business versus which costs go with the 11 manufacturing side of the business. By having 12 those two legal entities together, that was a diff 13 -- that was a challenge.</p> <p>14 Q. When would an accounting reconciliation 15 have been performed?</p> <p>16 A. Every month.</p> <p>17 Q. Do you know if Roxane and BIPI had their 18 own internal accounting systems?</p> <p>19 A. Roxane and BIPI -- beginning --</p> <p>20 MS. RIVERA: Object to form. Sorry.</p> <p>21 MR. FAUCI: It's all right.</p> <p>22 BY THE WITNESS:</p>

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17 (Pages 62 to 65)

<p style="text-align: right;">62</p> <p>1 A. Apparently, it says so, yes. 2 Q. Mr. Russillo testified that 3 notwithstanding his responsibilities for Roxane, he 4 was on the Ben Venue payroll, and he was not paid 5 by Roxane. I'm on page 23 of his January 8, 2009, 6 deposition. And I'll just read you what he said. 7 "Answer: I told you earlier my paycheck 8 came from Ben Venue. 9 "Question: Your paycheck came from Ben 10 Venue? 11 "Answer: Yes. 12 "Question: Did your paycheck ever come 13 from any other Boehringer Ingelheim entities from 14 the period of November 1997 until 2005? 15 "Answer: I don't believe so." 16 My question to you was: Was there any 17 formal accounting mechanism within Boehringer 18 Ingelheim for Roxane to reimburse Ben Venue for 19 work Mr. Russillo did on Roxane's behalf? 20 A. Not to my -- 21 MS. RIVERA: Object -- 22 BY THE WITNESS:</p>	<p style="text-align: right;">64</p> <p>1 A. 2005. 2 Q. Do you know when they started going on 3 Ben Venue's payroll? 4 MS. RIVERA: Object to -- 5 BY THE WITNESS: 6 A. Not -- 7 MS. RIVERA: -- form and foundation. 8 BY THE WITNESS: 9 A. Not exactly. 10 BY MR. FAUCI: 11 Q. What was the mechanism whereby Roxane 12 paid for the services? 13 A. There was accounting entries to charge 14 back for Roxane legal entity. 15 Q. Do you know how their salaries were 16 allocated? 17 A. They were completely allocated. All the 18 Roxane Laboratories sales and marketing people were 19 completely allocated to the Roxane legal entity. 20 Q. So if a employee had responsibilities on 21 behalf of both companies, would his salary be 22 allocated to both companies?</p>
<p style="text-align: right;">63</p> <p>1 A. -- knowledge. 2 MS. RIVERA: -- to form and foundation. 3 BY THE WITNESS: 4 A. Not to my knowledge. It was for the 5 other sales and marketing people though. 6 BY MR. FAUCI: 7 Q. What do -- say that again. 8 A. There was reimbursement for the other 9 sales and marketing people that were on Ben Venue 10 payroll but worked for our -- for Roxane. Those 11 costs were charged back to Roxane. 12 Q. Which sales and marketing people do you 13 have in mind? 14 A. The Roxane Laboratories sales and 15 marketing. 16 Q. Can you give me some names? 17 A. Paul Kersten, Judy Waterer, Leslie 18 Paoletti. 19 Q. So those people were on Ben Venue's 20 payroll? 21 A. At that time, yes. 22 Q. Which -- at what time?</p>	<p style="text-align: right;">65</p> <p>1 A. I don't know that. 2 Q. Would that be reflected in accounting 3 records, the allocation? 4 A. Yes. 5 Q. Would it show up on a Roxane income 6 statement? 7 A. You'd have to drill down to the cost 8 center level. We wouldn't see it specifically on 9 the income statement. 10 Q. And so you may have gathered I'm not the 11 most sophisticated accounting person in the world. 12 You say drill down to where? 13 A. The cost center level. 14 Q. What does that mean? 15 A. It's a department. 16 Q. And so if you drill down far enough 17 somewhere, there would be a record that employee X 18 was paid by Ben Venue but did work on behalf of 19 Roxane, and then how would that be accounted for? 20 A. It would be charged back to Roxane, and 21 you'd see it in the sales and marketing department 22 cost center.</p>

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<p style="text-align: right;">66</p> <p>1 Q. But you don't know if that happened for 2 Mr. Russillo?</p> <p>3 A. I don't know.</p> <p>4 Q. I'm just -- why -- can you think of a 5 reason why it would have happened for people like 6 Judy Waterer and Leslie Paoletti but not for Mr. 7 Russillo?</p> <p>8 MS. RIVERA: Object to form and 9 foundation.</p> <p>10 BY THE WITNESS:</p> <p>11 A. They -- those folks were fully allocated 12 to Roxanne. They didn't do any work for Ben Venue 13 Laboratories.</p> <p>14 MR. FAUCI: I think it's time just to 15 take a five-minute break.</p> <p>16 THE VIDEOGRAPHER: We are off the record 17 at 10:03 a.m.</p> <p>18 (WHEREUPON, a recess was had.)</p> <p>19 THE VIDEOGRAPHER: We are back on the 20 record at 10:18 a.m.</p> <p>21 (WHEREUPON, MS. DOLAN entered the 22 deposition proceedings.)</p>	<p style="text-align: right;">68</p> <p>1 Mr. Sicora testified: "My paycheck said 2 'Boehringer Ingelheim,' but all of the interactions 3 were with Roxane."</p> <p>4 "Question: All right. Who did you 5 believe was your employer?"</p> <p>6 "Answer: Roxane."</p> <p>7 My question to you is: For employees 8 such as Mr. Sicora, that said they were paid by 9 Boehringer Ingelheim but had Roxane job 10 responsibilities, would that have been allocated, 11 as well?</p> <p>12 A. Yes.</p> <p>13 Q. Similar to the way that --</p> <p>14 A. Well --</p> <p>15 Q. Oh, go on.</p> <p>16 A. -- if I could clarify. I don't think it 17 would be allocated. It'd be a direct charge as 18 opposed to an allocation.</p> <p>19 Q. What is the difference?</p> <p>20 A. The difference is if he's a -- if he's a 21 Roxane legal entity employee, it would be a direct 22 charge as payroll -- when they cut the payroll</p>
<p style="text-align: right;">67</p> <p>1 BY MR. FAUCI:</p> <p>2 Q. Mr. McIntyre, a moment ago you testified 3 that people in the Roxane sales and marketing 4 department, such as Leslie Paoletti and Judy 5 Waterer, though they were paid by Ben Venue, their 6 salaries were allocated back to Roxane, do you 7 recall that?</p> <p>8 A. Yes.</p> <p>9 Q. Do you know when that started?</p> <p>10 A. Not -- not for certain, no.</p> <p>11 Q. Do you know if it would've started before 12 the 2005 reorg?</p> <p>13 A. Yes.</p> <p>14 Q. Do you know who Robert Sicora is?</p> <p>15 A. No.</p> <p>16 Q. I'll represent to you that he is or was 17 the director of national accounts.</p> <p>18 A. For?</p> <p>19 Q. Well, we'll get -- we're going to get 20 into that briefly.</p> <p>21 Mr. Sicora testified -- this is his 22 December 4, 2008, deposition, at page 50.</p>	<p style="text-align: right;">69</p> <p>1 check, it would hit right into his particular cost 2 center as opposed to an accounting entry that would 3 be an allocation.</p> <p>4 Q. If he testified he was paid by BIPI, 5 would your answer be the same?</p> <p>6 MS. RIVERA: Hold on. Object to form, 7 misstates the testimony.</p> <p>8 BY THE WITNESS:</p> <p>9 A. I mean, you're -- it calls for 10 speculation, I think. If he was paid by dippy -- 11 BIPI, no, then -- then it would have to be an 12 allocation. But I don't know that he said he was 13 paid by BIPI.</p> <p>14 BY MR. FAUCI:</p> <p>15 Q. No, it's -- I'm not sure he did either. 16 He said he was paid by Boehringer Ingelheim.</p> <p>17 A. I think in those days, all our checks 18 said, "Boehringer Ingelheim."</p> <p>19 Q. Someone in the Roxane contracts 20 department -- well, strike that.</p> <p>21 MR. FAUCI: Let me introduce an exhibit. 22 (WHEREUPON, there was some</p>

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<p>78</p> <p>1 MS. RIVERA: Yeah, I was just several 2 pages in.</p> <p>3 MR. FAUCI: I'm on the top paragraph.</p> <p>4 MS. RIVERA: Okay.</p> <p>5 MR. FAUCI: I'll read it again.</p> <p>6 BY MR. FAUCI:</p> <p>7 Q. Mr. Berkley says: "Again, in the context 8 that Roxane preemptively launched Ipratropium prior 9 to any other generic competitors had a cost from a 10 BIPI perspective. It allowed sales for the Roxane 11 product at a lesser price than the branded price at 12 a time when Atrovent still was patent protected."</p> <p>13 My question to you is: Did Roxane pay 14 any money to BIPI for the right to market 15 Ipratropium Bromide at a time when BIPI still had a 16 patent protection for Atrovent?</p> <p>17 A. They paid the 11 percent royalty.</p> <p>18 Q. The same 11 percent royalty they paid 19 after Atrovent was no longer patent protected?</p> <p>20 A. Yes.</p> <p>21 MR. FAUCI: What are we on, Exhibit 7? 22 I'm going to introduce Exhibit 7.</p>	<p>80</p> <p>1 She was -- I don't know exact -- I don't recall her 2 exact position at this time.</p> <p>3 Q. It's a e-mail. The subject of the e-mail 4 is: "Atrovent UDV," and then it says, "AM11," 5 slash, "US." Ms. Maloney writes, "BIPI is the 6 holder for the Atrovent NDA. Roxane distributes 7 the generic product Ipratropium Bromide legally out 8 of the NDA. Also, Novation distributes Ipratropium 9 Bromide out of the NDA. All three products are 10 manufactured by Roxane." Do you see that?</p> <p>11 A. Yes.</p> <p>12 Q. Does this refresh your recollection as to 13 whether at least by 1999 Roxane had filed an ANDA 14 for Ipratropium Bromide UDV?</p> <p>15 A. It doesn't say that they filed an ANDA.</p> <p>16 Q. And it actually says that Roxane 17 distributes the generic product out of the NDA, 18 which was held by BIPI; correct?</p> <p>19 A. Correct.</p> <p>20 Q. It also says that all three products are 21 manufactured by Roxane. Do you see that?</p> <p>22 A. Yes.</p>
<p>79</p> <p>1 (WHEREUPON, a certain document was 2 marked Exhibit McIntyre 007, for identification.)</p> <p>3 BY MR. FAUCI:</p> <p>4 Q. This is a series of e-mails in the August 5 to October 1999 time frame. I'm going to direct 6 your attention to the third page of the document, 7 an e-mail -- feel free to read it all to get 8 familiarized at any time. I'm focusing on the 9 August 9, 1999, e-mail from Ann Maloney, sent at 10 1:18 p.m. Do you see that?</p> <p>11 A. Yes.</p> <p>12 MS. RIVERA: Yeah, Jim, you should make 13 sure you look at the whole document just to make 14 sure you're familiar with it.</p> <p>15 Ready?</p> <p>16 THE WITNESS: Yes.</p> <p>17 BY MR. FAUCI:</p> <p>18 Q. Ms. Maloney writes -- well, do you know 19 who Ms. Maloney is?</p> <p>20 A. Yes.</p> <p>21 Q. Who is she?</p> <p>22 A. Well, she's no longer with the company.</p>	<p>81</p> <p>1 Q. Roxane manufactured Atrovent?</p> <p>2 A. Yes.</p> <p>3 Q. When did that start? Focusing on the 4 Atrovent UDV.</p> <p>5 A. UDV, 1993, I believe.</p> <p>6 Q. Did Roxane sell Atrovent to BIPI?</p> <p>7 MS. RIVERA: Object to form.</p> <p>8 BY THE WITNESS:</p> <p>9 A. Yes, they would've sold the -- the 10 Atrovent UDV would've been sold to -- to -- to BIPI 11 by RLI.</p> <p>12 BY MR. FAUCI:</p> <p>13 Q. And then BIPI would turn around and 14 market and sell the products to customers under a 15 BIPI label?</p> <p>16 A. That's correct.</p> <p>17 Q. Were there written contracts evidencing 18 sales of Atrovent from Roxane to BIPI?</p> <p>19 A. Yes, I believe there was a 1993 contract 20 manufacturing agreement.</p> <p>21 Q. And that contract would have governed for 22 the life of Atrovent UDV?</p>

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<p>82</p> <p>1 A. My recollection is, it's a ten-year 2 contract, renewable.</p> <p>3 Q. How was the price -- the sale price from 4 Roxane to BIPI determined?</p> <p>5 A. Cost plus.</p> <p>6 Q. What does that mean?</p> <p>7 A. Manufacturing cost plus some -- some 8 markup.</p> <p>9 Q. What does "manufacturing cost" mean?</p> <p>10 A. Manufacturing cost is the cost of all the 11 ingredients plus labor and overhead.</p> <p>12 Q. Where did Roxane get the ingredients?</p> <p>13 A. The -- the active ingredient would have 14 come from BII. The Ipratropium Bromide is the 15 active ingredient.</p> <p>16 Q. And they would have purchased that from 17 the German parent?</p> <p>18 A. Yes.</p> <p>19 Q. And they --</p> <p>20 A. Well, I can't be sure. It could've come 21 from BIPI, 'cause BIPI purchased Ipratropium from 22 other products, but -- but it's a BII product.</p>	<p>84</p> <p>1 THE VIDEOGRAPHER: We are back on the 2 record at 10:50 a.m. with the start of tape number 3 two.</p> <p>4 BY MR. FAUCI:</p> <p>5 Q. We were just talking about the process by 6 which Roxane sold Atrovent to BIPI. Do you 7 remember that?</p> <p>8 A. Yes.</p> <p>9 Q. And you said that it sold it at cost 10 plus, do you recall that?</p> <p>11 A. Yes.</p> <p>12 Q. And we were trying to educate me and the 13 jury on what cost plus meant. And you said that 14 cost includes the ingredient costs, the labor costs 15 and the overhead costs, do you recall that?</p> <p>16 A. Yes.</p> <p>17 Q. What's the plus?</p> <p>18 A. The margin.</p> <p>19 Q. Do you recall what the margin was?</p> <p>20 A. No. In the 1993 contract, we were unable 21 to determine exactly what the margin would have 22 been and how that pricing was determined for that -</p>
<p>83</p> <p>1 Q. So they would buy the -- the active 2 ingredient -- Roxane would buy the active 3 ingredient from another Boehringer Ingelheim 4 entity?</p> <p>5 A. Yes.</p> <p>6 Q. And then Roxane would manufacture it?</p> <p>7 A. Yes.</p> <p>8 Q. And you said that the cost included what 9 else besides the ingredient costs?</p> <p>10 A. Labor and overhead.</p> <p>11 Q. What's included in overhead?</p> <p>12 A. General plan overhead, depreciation of 13 the equipment, depreciation of building, travel 14 expenses. There's a whole list of items that are 15 part of overhead.</p> <p>16 MR. FAUCI: I think we need to take a 17 break.</p> <p>18 THE VIDEOGRAPHER: We are off the record 19 at 10:39 a.m. with the end of tape number one. (WHEREUPON, a recess was had.) (WHEREUPON, MS. DOLAN left the deposition proceedings.)</p>	<p>85</p> <p>1 - and during that time frame.</p> <p>2 Q. So what was the result?</p> <p>3 A. I'm not sure I understand the question.</p> <p>4 Q. Oh, when you say you were unable to 5 determine what the margin was, what do you mean? In preparation for today?</p> <p>7 A. Yes.</p> <p>8 Q. But there was a margin in the 1993 9 contract that --</p> <p>10 A. I'd have to --</p> <p>11 Q. -- presumably?</p> <p>12 A. -- believe that there was, yes.</p> <p>13 Q. Do you know what the margin was at any 14 point in time from 1996 to the present?</p> <p>15 A. Yes.</p> <p>16 Q. What was it, and when did it become that?</p> <p>17 A. We're talking specifically about 18 Ipratropium Bromide UDVs?</p> <p>19 Q. Atrovent UDV.</p> <p>20 A. Atrovent -- Atrovent UDV. Well, 21 Atrovent UDVs were discontinued in 2003, so --</p> <p>22 Q. Okay.</p>

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23 (Pages 86 to 89)

<p style="text-align: right;">86</p> <p>1 A. -- but be -- up until 2003, the margin 2 was based -- was 2.2 percent, based on full cost. 3 Q. What does that mean, "based on full 4 cost"?</p> <p>5 A. Well, it includes the cost of the active 6 ingredient.</p> <p>7 Q. In addition to the labor and the 8 overhead?</p> <p>9 A. Labor and the overhead, that's --</p> <p>10 Q. How was --</p> <p>11 A. -- correct.</p> <p>12 Q. -- the 2.2 percent figure arrived at?</p> <p>13 A. 2.2 percent on total cost is -- gives -- 14 gives the same absolute margin or absolute profit 15 as ten percent on cost minus API.</p> <p>16 Q. What is "API"?</p> <p>17 A. Active pharmaceutical ingredient; that's 18 the Ipratropium Bromide. The way we do things 19 today is we charge ten percent on only third-party 20 acquired materials.</p> <p>21 Q. Materials acquired from outside --</p> <p>22 A. Outside, nonaffiliate companies. If it</p>	<p style="text-align: right;">88</p> <p>1 Q. And I understand that the -- why the 2.2 2 was used in place of the ten percent, but how was 3 the 2.2 number arrived at?</p> <p>4 A. Because it gave the same -- as I 5 mentioned, it gave the same level of profit as 6 using ten percent on a cost excluded the API.</p> <p>7 Q. Was it negotiated?</p> <p>8 A. Yes, and later -- later validated by 9 outside consultants.</p> <p>10 Q. And would this 2.2 percent or ten percent 11 markup have been true on all the products that 12 Roxane manufactured for Boehringer Ingelheim 13 entities?</p> <p>14 A. Yes.</p> <p>15 Q. Let me show you a document marked Exhibit 16 8. (WHEREUPON, a certain document was 18 marked Exhibit McIntyre 008, for identification.)</p> <p>19 BY THE WITNESS:</p> <p>20 A. 1998 Expectation and Budget.</p> <p>21 BY MR. FAUCI:</p> <p>22 Q. It's a September 30, 1998, document, that</p>
<p style="text-align: right;">87</p> <p>1 has affiliate material in there, we subtract that 2 from the total cost, because that affiliate 3 material already has some markup, so we don't -- 4 it's not fair to mark it up twice.</p> <p>5 Q. Okay. So focusing on the Atrovent UDV, 6 that there would be some markup applied to the 7 ingredient that Roxane would have purchased from 8 either BIPI or BII?</p> <p>9 A. Based -- yes, based on the way we do it 10 now or did it in -- from -- up until 2003.</p> <p>11 Q. And so based on the way it was done up 12 until 2003?</p> <p>13 A. Yes.</p> <p>14 Q. And because of that, the margin from 15 Roxane to BIPI was only 2.2 percent, is that 16 correct?</p> <p>17 A. At that time, yes. We don't know what it 18 was back in '93.</p> <p>19 Q. When did it become 2.2 percent?</p> <p>20 A. About that time, 2001, 2002.</p> <p>21 Q. And it stayed that way until 2003?</p> <p>22 A. Yeah, we discontinued the product.</p>	<p style="text-align: right;">89</p> <p>1 says, "Commentary, 1998 Expectation, 1999 Budget, 2 Roxane Laboratories, Incorporated." Take a moment 3 to familiarize yourself with it, but I will be 4 asking you questions about specific parts.</p> <p>5 A. Okay. Okay.</p> <p>6 Q. Are you familiar with this document?</p> <p>7 A. I've never seen this particular one, but 8 I'm somewhat familiar with it, yes.</p> <p>9 Q. What is an expectation?</p> <p>10 A. Expectation is an update of the current 11 year. So when you start out the year, you have 12 your budget; later in the year, we do an update of 13 what that budget is and what the expectation -- I 14 mean, what we're gonna come in at at the end of -- 15 the end of the year. So it's our projection for 16 what our actual costs or what our actual will be by 17 December 31st.</p> <p>18 Q. So it's --</p> <p>19 A. So it has no actual numbers, per se, in 20 there.</p> <p>21 Q. It's the revised budget based on the 22 year-to-date?</p>

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30 (Pages 114 to 117)

<p style="text-align: right;">114</p> <p>1 MS. RIVERA: -- my objection for the 2 record that Roxane's agreements and -- with its 3 customers and contracts with its customers falls 4 into the subject matter of that --</p> <p>5 MR. FAUCI: That's --</p> <p>6 MS. RIVERA: -- of that topic and doesn't 7 pertain to sales of those drugs between the 8 companies.</p> <p>9 MR. FAUCI: I think how -- this is just 10 for the record, but I -- it's my position that how 11 rebates were booked for sales of Roxane's products, 12 including rebates on BIPI's products, falls 13 squarely within the topic that is about Defendants' 14 practices, including accounting practices, with 15 respect to sales of certain products. But your 16 objection is on the record.</p> <p>17 BY MR. FAUCI:</p> <p>18 Q. So my question was: Do you know which 19 company, Roxane or BIPI, paid this rebate?</p> <p>20 A. No, I do not.</p> <p>21 Q. Who would I talk to to find that out?</p> <p>22 A. I -- I don't know.</p>	<p style="text-align: right;">116</p> <p>1 "Which company pays the rebate; BIPI, RLI or both? 2 This is still being decided upon. We'll have to 3 make the decision based on what is most cost 4 effective for the combined companies. We'll need 5 to plan to do it either way until it's resolved. 6 Hopefully, we'll have the final answer in a week or 7 two." Do you see that?</p> <p>8 A. I see that.</p> <p>9 Q. What do you understand Ms. Waterer to 10 mean when she writes "the combined companies"?</p> <p>11 MS. RIVERA: Object to form and 12 foundation.</p> <p>13 BY THE WITNESS:</p> <p>14 A. I can't speak to what she meant.</p> <p>15 BY MR. FAUCI:</p> <p>16 Q. Can you think of a reason why BIPI would 17 pay a rebate -- the rebate described in the Exhibit 18 13?</p> <p>19 MS. RIVERA: Object to form and 20 foundation.</p> <p>21 BY THE WITNESS:</p> <p>22 A. No, I don't know why.</p>
<p style="text-align: right;">115</p> <p>1 Q. I want to show you a document the court 2 reporter's gonna mark as Exhibit 14.</p> <p>3 (WHEREUPON, a certain document was 4 marked Exhibit McIntyre 014, for identification.)</p> <p>5 MR. FAUCI: Oops, I wrote on yours.</p> <p>6 MS. RIVERA: That's okay.</p> <p>7 MR. FAUCI: I think I have an extra, so.</p> <p>8 MS. RIVERA: What are we on, 13?</p> <p>9 MR. FAUCI: I think we're on 14.</p> <p>10 (WHEREUPON, MS. DENTON entered the 11 deposition proceedings.)</p> <p>12 BY MR. FAUCI:</p> <p>13 Q. This is a November 20, 1997, e-mail from 14 Judy Waterer to Dave Roberts, subject is: 15 "Respiratory Bundle." Are you familiar with this 16 document?</p> <p>17 A. No.</p> <p>18 Q. In bold, do you see where it says, 19 "Discussion Questions Related to Proposed 20 Respiratory Bundling Agreements"?</p> <p>21 A. I see that, yes.</p> <p>22 Q. And do you see the fourth bullet down,</p>	<p style="text-align: right;">117</p> <p>1 MR. FAUCI: I think we're at a natural 2 breaking point.</p> <p>3 MS. RIVERA: Okay.</p> <p>4 MR. FAUCI: We're going to go in a 5 different direction after this.</p> <p>6 MS. RIVERA: Okay.</p> <p>7 THE VIDEOGRAPHER: We are off the record 8 at 11:31 a.m.</p> <p>9 (WHEREUPON, a recess was had.)</p> <p>10 THE VIDEOGRAPHER: We are back on the 11 record at 11:50 a.m.</p> <p>12 BY MR. FAUCI:</p> <p>13 Q. I have a few more questions about the 14 period of time in 1996 when Atrovent was 15 substituted for generic Ipratropium Bromide. 16 Roxane and BIPI are separate companies, correct?</p> <p>17 A. Correct.</p> <p>18 Q. And just to recapture this, when Roxane 19 had a shortage of its generic Ipratropium Bromide 20 product, BIPI allowed Roxane to substitute Atrovent 21 in its place; is that correct?</p> <p>22 A. That's correct.</p>

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31 (Pages 118 to 121)

<p style="text-align: right;">118</p> <p>1 Q. And, in fact, the -- the sales prices for 2 generic Ipratropium were -- in effect, the sales 3 were at Roxane's generic prices; is that right? 4 A. To the customers, sales to the customers? 5 Q. Yes. 6 A. Yes, I believe that's the case. 7 Q. And so the sales price that BIPI booked 8 was -- was well within its average sales price for 9 Atrovent, correct? 10 A. That's correct. 11 Q. Please explain to the jury why BIPI would 12 allow Roxane to sell its Atrovent product at a 13 reduced price. 14 MS. RIVERA: Object to form. 15 Go ahead. 16 BY THE WITNESS: 17 A. Well, in this particular case, it was 18 because BIPI had distressed product. They had -- 19 they -- they had product that was gonna go short 20 code and would've had been destroyed had it not had 21 the opportunity to sell it through the Roxane 22 customers. So it represented a win-win, that we</p>	<p style="text-align: left;">120</p> <p>1 A. Uh-huh. 2 Q. She writes, "I plan to take the 3 discounted product to select customers that will be 4 the least likely to divert it." Do you see that? 5 A. Yes. 6 Q. "The customers that have been identified 7 as likely targets for Atrovent substitution of 8 generic IB-UDV are direct warehousing retail 9 chains, Accurate, and RDI." Do you see that? 10 A. Yes. 11 Q. Please tell me your testimony as to why 12 Roxane chose not to sell Atrovent at generic prices 13 to wholesalers. 14 A. My understanding from the wholesale -- 15 the way the business works with wholesalers is that 16 it takes too long to get through their distribution 17 channel, and that's -- and that's when this product 18 might expire. 19 Q. Ms. Waterer writes that she plans to take 20 the disproduct -- discounted product to select 21 customers that will be the least likely to divert 22 it. What does that mean?</p>
<p style="text-align: right;">119</p> <p>1 were able to get a price better than nothing, 2 better than throwing it away. 3 BY MR. FAUCI: 4 Q. What do you mean it was a distressed 5 product? 6 A. It was short code. 7 Q. What does that mean? 8 A. It means that it could expire. 9 Q. What do you mean, "could expire"? 10 A. Well, every product has a certain shelf 11 life, and once it gets within -- typically once you 12 get within 12 months, you can't sell it through 13 wholesalers, which is why some of this document 14 says that sales wouldn't go through wholesalers, 15 because it takes them too long to get it through 16 their distribution channel, and the product would 17 expire before -- before it -- it reached the 18 customer. 19 Q. Can you look back at Exhibit 11. I'm 20 looking at the second page of the exhibit, the 21 paragraph starting, "I plan." This is Ms. Waterer 22 writing.</p>	<p style="text-align: left;">121</p> <p>1 A. I'm not sure what that means. 2 Q. A little bit further down, she writes, 3 "Apria, MP Total Care, and Health Scripts will also 4 be candidates for this substitution once they sign 5 the 14 percent Loyalty Bonus Program Contract, as 6 it has very specific definitions and penalties 7 regarding diversion." You don't know what 8 "diversion" means in that context? 9 A. No. 10 Q. Are you familiar with the difference -- 11 how is a sale to a wholesaler different than a sale 12 to a customer such as a chain pharmacy? 13 MS. RIVERA: Object to form and 14 foundation. 15 BY THE WITNESS: 16 A. Chain pharmacies run their -- have their 17 own warehouses, so they go -- they can go directly 18 through their individual stores and move the 19 product through quicker, whereas the wholesalers 20 wouldn't. 21 BY MR. FAUCI: 22 Q. Isn't it also true that a sale to a</p>

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36 (Pages 138 to 141)

	138	140
1	A. Yes.	
2	Q. Would this in large part be explained by	
3	its decision to dividend up \$320 million to its	
4	parent corporation?	
5	MS. RIVERA: Object to form.	
6	BY THE WITNESS:	
7	A. Yes.	
8	BY MR. FAUCI:	
9	Q. And do you see that Roxane's loans from	
10	affiliates have gone from zero to \$140 million?	
11	A. I see that.	
12	Q. Why at this -- why would Roxane dividend	
13	\$320 million to its parent only to take a loan from	
14	an affiliate of \$140 million?	
15	MS. RIVERA: Object to form.	
16	BY THE WITNESS:	
17	A. The loan would have been to help fund the	
18	\$320 million because they didn't have enough cash	
19	on hand.	
20	BY MR. FAUCI:	
21	Q. Well, let's look at Exhibit 20, which is	
22	Roxane's year-end statement for 2001. Do you see	
	139	141
1	the retained earnings as of the end of 2001?	
2	MS. RIVERA: Hold on. 20? Okay.	
3	MR. FAUCI: Yes, we're on Exhibit 20.	
4	MS. RIVERA: Okay.	
5	BY THE WITNESS:	
6	A. Yes.	
7	BY MR. FAUCI:	
8	Q. And what are the retained earnings at the	
9	end of 2001?	
10	A. \$358,522,000.	
11	Q. And so Roxane could have funded the 320	
12	million dividend out of its own retained earnings,	
13	is that correct?	
14	MS. RIVERA: Object to form.	
15	BY THE WITNESS:	
16	A. But you have -- you have to pay the	
17	dividends with something, so some other account on	
18	the balance sheet would've had to change, they	
19	would've had -- have enough money to -- to fund	
20	that payment.	
21	BY MR. FAUCI:	
22	Q. I'm not following. Can you explain that?	

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37 (Pages 142 to 145)

<p style="text-align: right;">142</p> <p>1 interest on those loans.</p> <p>2 A. Yes.</p> <p>3 Q. And so I'm trying to understand what this</p> <p>4 \$140 million entry is. Did -- does this reflect</p> <p>5 that at the end of 2002, Roxane had to borrow 140</p> <p>6 million doll -- Roxane chose to borrow \$140 million</p> <p>7 from its affiliates?</p> <p>8 A. Yes.</p> <p>9 Q. And it chose to -- and it paid interest</p> <p>10 on those loans?</p> <p>11 A. Believe so, yes.</p> <p>12 Q. And it did that -- and in the year prior</p> <p>13 to that, if you look at Exhibit 20, Roxane had no</p> <p>14 loans outstanding to affiliates; is that correct?</p> <p>15 A. Correct.</p> <p>16 Q. And so between 2001 and 2002, Roxane paid</p> <p>17 a dividend of \$320 million to its parent; correct?</p> <p>18 A. Correct.</p> <p>19 Q. And then took out loans of \$140 million</p> <p>20 from its affiliates, is that correct?</p> <p>21 A. Correct.</p> <p>22 Q. How was that beneficial to Roxane?</p>	<p style="text-align: right;">144</p> <p>1 three.</p> <p>2 BY MR. FAUCI:</p> <p>3 Q. Welcome back.</p> <p>4 A. Thank you.</p> <p>5 Q. I just have a few more questions. And I</p> <p>6 think we should start by what the court reporter</p> <p>7 has marked as Exhibit 23.</p> <p>8 (WHEREUPON, a certain document was</p> <p>9 marked Exhibit McIntyre 023, for identification.)</p> <p>10 BY THE WITNESS:</p> <p>11 A. Thank you.</p> <p>12 BY MR. FAUCI:</p> <p>13 Q. This is another in the series of</p> <p>14 documents, which is a Roxane Laboratories Unanimous</p> <p>15 Written Consent of Directors, and this appears to</p> <p>16 contain the closing -- year-end closing for 2003,</p> <p>17 is that correct?</p> <p>18 A. That's correct.</p> <p>19 Q. I'm going to ask you to turn to the</p> <p>20 balance sheet. It's a number of pages in. It's</p> <p>21 the page Bates labeled BOEH04600471. And do you</p> <p>22 see that the retained earnings for Roxane at the</p>
<p style="text-align: right;">143</p> <p>1 MS. RIVERA: Object to form.</p> <p>2 BY THE WITNESS:</p> <p>3 A. I'm not sure how to -- how to answer</p> <p>4 that.</p> <p>5 MS. RIVERA: Do you need him to re --</p> <p>6 give you more information or rephrase it, or --</p> <p>7 THE WITNESS: No.</p> <p>8 MS. RIVERA: -- are you just thinking?</p> <p>9 THE WITNESS: I'm thinking.</p> <p>10 MS. RIVERA: Okay.</p> <p>11 BY THE WITNESS:</p> <p>12 A. I -- I don't know how to answer that.</p> <p>13 BY MR. FAUCI:</p> <p>14 Q. Can I show you exhibit --</p> <p>15 MR. FAUCI: Why don't we take a break.</p> <p>16 We only have a couple minutes on the tape.</p> <p>17 MS. RIVERA: Oh, okay.</p> <p>18 THE VIDEOGRAPHER: We are off the record</p> <p>19 at 12:24 p.m. with the end of tape number two.</p> <p>20 (WHEREUPON, a recess was had.)</p> <p>21 THE VIDEOGRAPHER: We are back on the</p> <p>22 record at 1:15 p.m. with the start of tape number</p>	<p style="text-align: right;">145</p> <p>1 end of 2003 were \$65 million?</p> <p>2 A. Yes.</p> <p>3 Q. Can you turn the page. This is -- says,</p> <p>4 "Roxane Laboratories Statement of Financial</p> <p>5 Position, Actual 2003 versus Budget 2003." Do you</p> <p>6 see that?</p> <p>7 A. Yes.</p> <p>8 Q. Look at the very bottom. Can you read</p> <p>9 what it says under "Retained Earnings"?</p> <p>10 A. "Retained earnings was \$241.9 million</p> <p>11 below budget. This reduction is the result of</p> <p>12 increased dividend payments made at year-end 2002."</p> <p>13 Q. And then can you read the section "Loans</p> <p>14 From Affiliates" directly above it.</p> <p>15 A. "Loans from affiliates were 62.3 million</p> <p>16 above budget. The reason for the increase is the</p> <p>17 interim dividend payment made in 2002. For the</p> <p>18 Budget, the planned dividend was 75 million versus</p> <p>19 the actual payment of 320 million."</p> <p>20 Q. What does it -- what does it mean that</p> <p>21 it's an "interim dividend payment"?</p> <p>22 A. I'm not sure what the reference to</p>

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41 (Pages 158 to 161)

<p>1 A. My understanding is Roxane did.</p> <p>2 Q. Was the trademark for that drug ever</p> <p>3 owned by BIPI?</p> <p>4 A. Not to my knowledge.</p> <p>5 Q. If I ask you the same question for</p> <p>6 Roxicodone --</p> <p>7 A. Yes.</p> <p>8 Q. -- was that a drug that was marketed by</p> <p>9 Roxane prior to 2001?</p> <p>10 A. Yes.</p> <p>11 Q. Did Roxane own the trademark for that</p> <p>12 drug?</p> <p>13 A. Best of my knowledge, yes.</p> <p>14 Q. Let me ask you a question about the</p> <p>15 distribution agreement for Viramune. Do you know</p> <p>16 when, if at all, that distribution agreement ended?</p> <p>17 MS. RIVERA: Do you mean the licensing</p> <p>18 agreement, Ros?</p> <p>19 MS. POLLACK: Sorry, the licensing</p> <p>20 agreement.</p> <p>21 BY THE WITNESS:</p> <p>22 A. The licensing agreement ended in 2001.</p>	<p>158</p> <p>1 term -- the length -- by "term," you mean length of</p> <p>2 term, I assume.</p> <p>3 BY MS. POLLACK:</p> <p>4 Q. Right. Length of time.</p> <p>5 A. I -- I don't recall.</p> <p>6 Q. Do you recall if Roxane paid any fee to</p> <p>7 terminate that license agreement in 2001?</p> <p>8 A. No, but they -- they would just have</p> <p>9 discontinued paying the royalty.</p> <p>10 Q. Well, Mr. Fauci marked a number of year-</p> <p>11 end statements and balance sheets earlier today.</p> <p>12 Are you familiar with the fact that on occasion</p> <p>13 Roxane made short-term advances to affiliates?</p> <p>14 A. Yes.</p> <p>15 Q. Okay. When would those kinds of advances</p> <p>16 be made?</p> <p>17 A. Well, just similar to the short-term</p> <p>18 loans, all of that, either advances or loans,</p> <p>19 they're all part of the cash pooling process that</p> <p>20 takes place with all the activity that goes on</p> <p>21 between the companies.</p> <p>22 Q. When there was a short-term advance to an</p>
<p>159</p> <p>1 BY MS. POLLACK:</p> <p>2 Q. And why was that?</p> <p>3 A. 2001 was the year that Roxane divested</p> <p>4 itself of the pain medication products, which</p> <p>5 included the Roxicodone and the Oramorph we just</p> <p>6 discussed. As a result of that divestment, the</p> <p>7 sales force that marketed those products was -- was</p> <p>8 eliminated; and as a result, BIPI took the product</p> <p>9 back. And at the same time, BIPI had a -- another</p> <p>10 aged related drug in development. And with that</p> <p>11 product coming online soon, they wanted -- they had</p> <p>12 the combination of those two A drugs that they</p> <p>13 would be marketing.</p> <p>14 Q. What was the term of the license</p> <p>15 agreement that Roxane had for Viramune; in other</p> <p>16 words, was it yearly, monthly?</p> <p>17 A. Viramune license agreement.</p> <p>18 MS. RIVERA: Object to form, beyond the</p> <p>19 scope of the notice.</p> <p>20 If you know.</p> <p>21 BY THE WITNESS:</p> <p>22 A. Yeah, I don't -- I don't recall what the</p>	<p>161</p> <p>1 affiliate made by Roxane, would there be any</p> <p>2 documentation relating to that advance?</p> <p>3 A. It would be in -- in the internal</p> <p>4 accounting records.</p> <p>5 Q. Would there be a note signed?</p> <p>6 A. I don't know if there'd be a note signed.</p> <p>7 Q. Would -- would there be any kind of</p> <p>8 letter agreement or contract re -- relating to that</p> <p>9 advance?</p> <p>10 A. I don't know.</p> <p>11 Q. Would there be interest associated with</p> <p>12 the short-term advance?</p> <p>13 A. Yes, there should be, based on that LIBOR</p> <p>14 rate we discussed earlier, on the affiliate loan.</p> <p>15 Q. When you say, "there should be," were</p> <p>16 there, in fact, interest terms associated with the</p> <p>17 short-term --</p> <p>18 A. Yes --</p> <p>19 Q. -- investment --</p> <p>20 A. -- there were interest terms.</p> <p>21 Q. And would the interest be paid by a</p> <p>22 bookkeeping line item?</p>

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<p>1 A. If -- well, what do you mean by 2 "bookkeeping line item" -- 3 Q. Yeah -- 4 A. -- please? 5 Q. -- let me -- let me rephrase that. 6 How would the interest payments be made? 7 A. It would be made as part of the -- the 8 accounting records. 9 Q. Would actual cash transfer from one 10 entity to another? 11 A. Again, that's all part of the -- all of 12 these loans and things are all part of the cash 13 pooling and the -- and the -- and the netting of 14 the -- the affiliate transactions that take place. 15 Q. Could you describe what you mean by "the 16 cash pooling." 17 A. The -- Boehringer uses what's called a 18 zero balance cash, so every -- every legal entity 19 has their own bank account, so to speak. But at 20 the end of the day, the -- the bank where all these 21 accounts are just kind of sweeps all that cash into 22 one pool. And then they still record the quant --</p>	<p>162</p> <p>1 money in the pool was swept out daily and sent to 2 Germany, you wouldn't have any reason to disagree 3 with that? 4 A. I wouldn't, no. 5 Q. Can you take a look at Exhibit 8, that 6 Mr. Fauci asked you about earlier. 7 A. Yes. 8 Q. And on page 23, it states that the "MDI 9 and SM standard based upon bulk material being 10 transferred to RLI at zero cost. This assumption 11 is no longer valid." 12 A. Yes. 13 Q. Yes, you read that. Does that indicate 14 to you that prior to a change being reflected in 15 the budget, the cost of goods sold were being 16 reflected at a zero cost -- 17 MS. RIVERA: Object to form. 18 BY MS. POLLACK: 19 Q. -- for the MDI and the SM products? 20 A. And I think I testified earlier that I 21 was unaware what the -- what the accounting change 22 meant, so I couldn't speak to this.</p>
<p>1 the amount of cash by legal entities, but that -- 2 they pool it all together so that they can invest 3 that money to earn interest. 4 Q. Is that -- 5 A. It's much -- much -- 6 Q. -- money invested on behalf of BIC? 7 A. It's invested on behalf of all the legal 8 entities. 9 Q. Is the money swept out of that pool daily 10 and -- and sent out of the country? 11 A. It's swept out of the pool daily. I 12 don't know that it's swept -- or sent out of the 13 country, no. 14 Q. If Mr. -- 15 A. It remains -- 16 Q. -- Tetzner -- 17 A. -- in -- it remains in BIC's -- it 18 remains in BIC's account or in fund with all the -- 19 with all the individual legal entities. It's kept 20 track of by the legal entity account numbers, but 21 it's all in one pool. 22 Q. But if Mr. Tetzner had testified that the</p>	<p>163</p> <p>165</p> <p>1 Q. It doesn't say to you that whatever the 2 accounting change meant, it was a change from zero 3 to something else? 4 MS. RIVERA: Object to form. 5 BY THE WITNESS: 6 A. I -- I see that's what it says, but I 7 can't speak to it. 8 BY MS. POLLACK: 9 Q. Now, this statement also indicates that 10 there's something called the self medication 11 product. 12 MS. RIVERA: Where are you, Ros? 13 MS. POLLACK: Right on that same page on 14 the -- 15 MS. RIVERA: Oh, okay. 16 MS. POLLACK: -- standard cost of goods 17 sold, self medication product. 18 MS. RIVERA: I got it. 19 MS. POLLACK: You see that? 20 MS. RIVERA: Yep. 21 Sorry, Jim. 22 BY MS. POLLACK:</p>

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<p style="text-align: right;">174</p> <p>1 of one of the options, the preferred option. 2 Q. And the third bullet says, "Moves 3 employees under the legal entity to which they 4 report," is that correct? 5 A. That's correct. 6 Q. So there were people who were employed by 7 one company but reporting to another, is that what 8 that means? 9 A. Yes, specifically the manufacturing 10 situation we just discussed. 11 Q. Are you talking about the Combivent? 12 A. Yes. 13 Q. Well, weren't these people prior to 19 -- 14 I'm sorry, prior to 2005, who were manufacturing 15 Combivent, BIPI employees? 16 A. That's correct. 17 Q. And that prior to 2005, Combivent was a 18 BIPI drug; right? 19 A. That's correct. It still is. 20 Q. So why would you have to move them under 21 the legal entity which -- to which they report when 22 they were already under the legal entity to which</p>	<p style="text-align: right;">176</p> <p>1 people. 2 Q. The next bullet point, there's a line, 3 the oper -- the organization with the actual 4 businesses, what's meant by that? 5 A. Again, given that the overriding driver 6 for the separation or for the reorganization was to 7 separate the two legal entities or to separate the 8 two businesses that were part of the Roxane legal 9 entity, we wanted to get the organization aligned 10 so that the manufacturing people were all part of 11 the manufacturing organization and the sales and 12 marketing people were part of the sales 13 organization, so that those two businesses could be 14 judged and -- their performance could be judged 15 independently. 16 Q. And what does the last bullet point say 17 under "the advantages of the new legal entity"? 18 A. At the -- way down at the bottom, the 19 "allows for separation of liability"? 20 Q. Yes. Could you read that into the 21 record, please. 22 A. "Allows for separation of liability for</p>
<p style="text-align: right;">175</p> <p>1 they reported? 2 A. Because -- because the -- the Roxane 3 manufacturing people were responsible for that 4 manufacturing line. And those manufacturing people 5 in BIPI were reporting to people in Roxane, or BIRI 6 after the 2005 split. And that's why this comment 7 says move people -- move people -- employees under 8 the legal entity to which they report. That was 9 one of the anomalies of the -- of our organization, 10 that the 2005 organization wanted to -- wanted to 11 correct. Remember, the overriding driver of the 12 reorganization was to separate the two businesses 13 that were part of the Roxane business prior to 2005 14 and part of the Roxane legal entity. 15 Q. But the Combivent was part of BIPI prior 16 to 2005? 17 A. That's correct, the manufacturing was, 18 yes, but managed -- 19 Q. And -- 20 A. -- by BIRI people. 21 Q. I'm sorry, I didn't hear that. 22 A. But managed by Roxane manufacturing</p>	<p style="text-align: right;">177</p> <p>1 Marketing and Sales of Multisource and 2 manufacturing of Multisource products." The intent 3 of that bullet is to -- is to -- we're really just 4 trying to align liability with the business, so if 5 manufacturing had a -- if there was a manufacturing 6 liability, the manufacturing legal entity was -- 7 was accountable for that. So we're just trying to 8 align liability with the business. 9 Q. Whereas, prior to that time, any of those 10 liabilities would have been part of Roxane 11 Laboratories, Inc., which had both the 12 manufacturing and the sales for the multisource 13 product; is that correct? 14 A. Excuse -- I -- I didn't hear your entire 15 question, so if you could repeat it, please. 16 MS. POLLACK: Could you read it back? 17 Did you get it -- 18 THE COURT REPORTER: You trailed off -- 19 MS. POLLACK: -- the court reporter? 20 THE COURT REPORTER: -- at the end for 21 me, too. 22 BY THE WITNESS:</p>

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<p style="text-align: right;">178</p> <p>1 A. She didn't get it either.</p> <p>2 THE COURT REPORTER: Prior to that time -</p> <p>3 -</p> <p>4 BY MS. POLLACK:</p> <p>5 Q. Sure. I'm sorry. Let me try again.</p> <p>6 So prior to this time, however, the</p> <p>7 liabilities for the Roxane manufacturing operation</p> <p>8 and the Roxane sales and marketing organization</p> <p>9 would have been liabilities of Roxane Laboratories,</p> <p>10 Inc.?</p> <p>11 A. That's correct.</p> <p>12 MS. POLLACK: I have nothing further.</p> <p>13 MS. RIVERA: Anybody else on the phone?</p> <p>14 MR. WINGET-HERNANDEZ: Yeah, I'm here,</p> <p>15 but I'm reserving my questioning.</p> <p>16 MS. RIVERA: Okay. Can we take like a</p> <p>17 15, 20 minute break so I can get my ducks in a row,</p> <p>18 and then we can come back?</p> <p>19 MR. FAUCI: Thank you.</p> <p>20 THE VIDEOGRAPHER: We are off the record</p> <p>21 at 1:58 p.m.</p> <p>22 (WHEREUPON, a recess was had.)</p>	<p style="text-align: right;">180</p> <p>1 Q. Okay. If you looked at Exhibit 10, which</p> <p>2 is the October 23, 1996, interoffice memo from Mr.</p> <p>3 Spitali, do you see that?</p> <p>4 A. Yes.</p> <p>5 Q. Okay. I just wanted to direct your</p> <p>6 attention in the third paragraph, the last</p> <p>7 sentence, do you see where it says, "We are able to</p> <p>8 fill selected orders because the BIPI's Atrovent</p> <p>9 Solution inventory is, quote, "distressed" due to</p> <p>10 dating and lowering sales volumes." Do you see</p> <p>11 that?</p> <p>12 A. Yes, I see that.</p> <p>13 Q. Okay. Is that consistent with your</p> <p>14 testimony that you believe that BIPI was willing to</p> <p>15 engage in this project in part because its</p> <p>16 inventory was short dated?</p> <p>17 MR. FAUCI: Objection to the form.</p> <p>18 BY THE WITNESS:</p> <p>19 A. Yes.</p> <p>20 BY MS. RIVERA:</p> <p>21 Q. Okay. And if BIPI was unable to sell</p> <p>22 this product through the substitution program for</p>
<p style="text-align: right;">179</p> <p>1 (WHEREUPON, MR. ANDERSON</p> <p>2 disconnected from telephonic communication.)</p> <p>3 THE VIDEOGRAPHER: We are back on the</p> <p>4 record at 2:30 p.m.</p> <p>5</p> <p>6 EXAMINATION</p> <p>7 BY MS. RIVERA:</p> <p>8 Q. Good afternoon, Mr. McIntyre. I just</p> <p>9 wanted to take a few minutes to follow-up on a few</p> <p>10 things that you discussed with Mr. Fauci and</p> <p>11 clarify a few things.</p> <p>12 Do you recall a discussion with Mr. Fauci</p> <p>13 about a time period in 1996 where brand name</p> <p>14 Atrovent was substituted for Roxane's Ipratropium</p> <p>15 Bromide?</p> <p>16 A. Yes.</p> <p>17 Q. Okay. And I wanted -- wondered if you</p> <p>18 could look in your stack back at Exhibits 10 and</p> <p>19 11. Do you have them? Keep going. There --</p> <p>20 A. They're probably --</p> <p>21 Q. -- they are.</p> <p>22 A. -- further down. Here's 10 and 11.</p>	<p style="text-align: right;">181</p> <p>1 Roxane's Ipratropium Bromide, what was likely to</p> <p>2 happen to that inventory that was distressed?</p> <p>3 A. Expired product would have been</p> <p>4 destroyed.</p> <p>5 Q. Okay. And if the product had been</p> <p>6 destroyed, would BIPI make any money on that</p> <p>7 product?</p> <p>8 A. No.</p> <p>9 Q. Okay. And, in fact, in two paragraphs</p> <p>10 down, there's a sentence from Mr. Spitali who</p> <p>11 says, "This is a win-win situation."</p> <p>12 A. I see that.</p> <p>13 Q. Okay. Is that consistent with your</p> <p>14 understanding of -- of the situation for BIPI and</p> <p>15 Roxane?</p> <p>16 MR. FAUCI: Objection to form.</p> <p>17 BY THE WITNESS:</p> <p>18 A. Yes.</p> <p>19 BY MS. RIVERA:</p> <p>20 Q. Okay. And then if you would just look at</p> <p>21 Exhibit 11, the paragraph at the bottom on the</p> <p>22 first page, where it says, "Mike." It says, "Mike</p>

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<p style="text-align: right;">186</p> <p>1 A. I confirmed that with Judy Waterer. 2 BY MS. RIVERA: 3 Q. Okay. There was also some discussion 4 about some commitment agreements and rebates that 5 were paid. Do you recall that discussion? 6 A. Yes. 7 Q. Okay. It's in reference to Exhibit 17. 8 MS. RIVERA: Oh, actually -- well, can 9 you mark -- 10 MR. FAUCI: I'm thinking it's on 17. 11 MS. RIVERA: It's what? 12 MR. FAUCI: Nothing. 13 MS. RIVERA: Oh, you know what -- 14 BY THE WITNESS: 15 A. 13. 16 BY MS. RIVERA: 17 Q. Yeah, it's -- I'm looking at -- yeah, and 18 set that aside for one minute. I wanted to mark 19 one more document with you on the last issue. 20 (WHEREUPON, a certain document was 21 marked Exhibit McIntyre 026, for identification.) 22 BY MS. RIVERA:</p>	<p style="text-align: right;">188</p> <p>1 Q. Is that -- 2 A. Yes. 3 Q. -- referring to the substitution that we 4 were discussing? 5 A. Yes. 6 Q. Okay. He says, "I have listed below the 7 process I -- as I understand it, which was 8 implemented as of last Friday, October 25th." Can 9 you read through that, and tell me whether that 10 supports your testimony as to whether BIPI booked 11 these sales, and there were no intra-company sales. 12 MR. FAUCI: Objection to the form. 13 BY THE WITNESS: 14 A. I see in point three that Judy Waterer is 15 going to communicate to the -- the BI Services 16 Center which orders will be processed as BIPI 17 invoices. 18 BY MS. RIVERA: 19 Q. And what does that mean? 20 A. So that confirms -- to me, that confirms 21 that BIPI was gonna book the sale for the -- that 22 entry.</p>
<p style="text-align: right;">187</p> <p>1 Q. Okay. The court reporter's handed you 2 what has been marked as Exhibit 26. 3 MS. RIVERA: And for the record, the top 4 -- it's an e-mail chain, the top e-mail is from 5 Judy Waterer, dated November 4, 1996. 6 BY MS. RIVERA: 7 Q. Do you see that? 8 A. Yes, I do. 9 Q. Okay. If you would look to what looks 10 like the third e-mail on this page from John Swartz 11 to Ed Tupa. 12 A. Yes, I have it. 13 Q. Okay. And that's dated Thursday, October 14 31st? 15 A. Yes. 16 Q. Okay. If you could take a look at this, 17 it says, "This is regarding the RLI sales of 18 Ipratropium that will be filled with BIPI's 19 Atrovent." That's referring to the substitution 20 that we were discussing? 21 MR. FAUCI: Objection to the form. 22 BY MS. RIVERA:</p>	<p style="text-align: right;">189</p> <p>1 Q. Okay. If Roxane had booked the sale, 2 what would you expect that to be? 3 A. It would have referenced Roxane invoices. 4 Q. Okay. Okay. Now moving on to the 5 bundling and rebate agreements. I believe you were 6 asked who booked and paid for the rebates on BIPI 7 products that are a part of this -- these 8 commitment and loyalty agreements. Do you recall 9 that? 10 A. Yes, I do. 11 Q. Okay. 12 (WHEREUPON, a certain document was 13 marked Exhibit McIntyre 027, for identification.) 14 BY MS. RIVERA: 15 Q. What number is that? I'm sorry. 16 A. 27. 17 Q. Thank you. Okay. You've been handed a 18 document, which is dated -- I'm sorry, which has 19 been marked Exhibit 27. And in the first paragraph 20 there, it says, "After discussing the one percent 21 rebate for the branded product and in doing an 22 analysis," et cetera, "Shelly and I agree that the</p>

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<p style="text-align: right;">190</p> <p>1 one percent rebate should be charged against the 2 Roxane P&L."</p> <p>3 What does that indicate to you in terms 4 of how rebates for BIPI products that were part of 5 Roxane loyalty or commitment agreements were 6 booked?</p> <p>7 A. They're going to be paid for by Roxane.</p> <p>8 Q. Okay. And were you able to do any other 9 research to confirm that this is the way it worked 10 for -- for all of these various agreements?</p> <p>11 A. Yes, I confirmed this with Judy Waterer.</p> <p>12 Q. Okay. So BIPI was not paying the rebate 13 even though the rebate was based on BIPI products?</p> <p>14 A. That's correct.</p> <p>15 MR. FAUCI: Objection to form.</p> <p>16 BY MS. RIVERA:</p> <p>17 Q. Okay. You were also asked some questions 18 about dividend payments from Roxane to BIC. Do you 19 recall that discussion?</p> <p>20 A. Yes.</p> <p>21 Q. Okay. What is the purpose of dividend 22 payments?</p>	<p style="text-align: right;">192</p> <p>1 A. Yes, I did.</p> <p>2 Q. Okay. Based on your knowledge of 3 Roxane's financial condition and the -- the payment 4 of these dividends, do you believe that any of the 5 dividend payments that were made by Roxane to BIC 6 during the relevant time frame left Roxane 7 undercapitalized?</p> <p>8 MR. FAUCI: Objection --</p> <p>9 MS. POLLACK: Objection --</p> <p>10 MR. FAUCI: -- to the form.</p> <p>11 BY THE WITNESS:</p> <p>12 A. No.</p> <p>13 BY MS. RIVERA:</p> <p>14 Q. Okay. And why not?</p> <p>15 A. 'Cause --</p> <p>16 MR. FAUCI: Objection to the form.</p> <p>17 BY THE WITNESS:</p> <p>18 A. They continued to have positive retained 19 earnings, and they also had positive working 20 capitals to fund their day-to-day operations.</p> <p>21 BY MS. RIVERA:</p> <p>22 Q. Okay. And during the time that you were</p>
<p style="text-align: right;">191</p> <p>1 A. Typically it's to return part of the 2 investment to the parent company.</p> <p>3 Q. Okay. And is this a normal procedure 4 between subsidiary and parent companies?</p> <p>5 A. Yes.</p> <p>6 MR. FAUCI: Objection to form.</p> <p>7 BY THE WITNESS:</p> <p>8 A. Yes.</p> <p>9 BY MS. RIVERA:</p> <p>10 Q. Okay. Based on your -- well, let me ask 11 you this: Based on your -- sorry, strike that 12 again.</p> <p>13 You were a member of Roxane's finance 14 department from 1996 to 2005, is that correct?</p> <p>15 A. That's correct.</p> <p>16 Q. Okay. And as a member of Roxane's 17 finance department, were you familiar with Roxane's 18 financial condition during that time frame?</p> <p>19 A. Yes.</p> <p>20 Q. Okay. And in preparation for this 21 deposition, did you review Roxane's financial 22 statements over time?</p>	<p style="text-align: right;">193</p> <p>1 in Roxane's financial department, do you know if 2 Roxane -- you know, during the entire time they -- 3 that you were in Roxane's financial department, if 4 you have -- if Roxane had sufficient working 5 capital to fund its day-to-day operations?</p> <p>6 MR. FAUCI: Objection to the form.</p> <p>7 BY THE WITNESS:</p> <p>8 A. Yes.</p> <p>9 BY MS. RIVERA:</p> <p>10 Q. Okay. Was there ever a time when Roxane 11 was unable to pay its day-to-day obligations during 12 this time period?</p> <p>13 A. No.</p> <p>14 MR. FAUCI: Objection to the form.</p> <p>15 BY MS. RIVERA:</p> <p>16 Q. Okay.</p> <p>17 MS. RIVERA: What's your objection?</p> <p>18 MR. FAUCI: Can you repeat the question?</p> <p>19 THE COURT REPORTER: "Question: Okay" --</p> <p>20 MR. FAUCI: I can read it.</p> <p>21 The objection is that I'm very unclear 22 what you mean by the phrase "day-to-day"</p>

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<p style="text-align: right;">194</p> <p>1 operations," so I would say it's vagueness. 2 MS. RIVERA: Okay. 3 BY MS. RIVERA: 4 Q. Are you aware -- let me just try to fix 5 it, even though I disagree with the -- do you 6 understand what I mean by "day-to-day operations," 7 Mr. McIntyre? 8 A. Yes. 9 Q. And how would you describe the day-to-day 10 operations of Roxane? 11 A. To be able to pay our bills, pay our -- 12 our vendors, pay our employees, purchase -- 13 purchase ingredients, raw materials for -- for 14 manufacturing. 15 Q. Okay. Okay. So let me just ask it 16 again. Based on that day-to-day -- based on that 17 definition of -- of day-to-day business, do you 18 believe based on your familiarity with Roxane's 19 financial con -- condition and your review of 20 Roxane's financial statements that Roxane had 21 sufficient capital to pay its day-to-day expenses - 22 -</p>	<p style="text-align: right;">196</p> <p>1 A. Yes, there is a general rule, guideline 2 from our corporate parent, that the debt to equity 3 ratio shouldn't exceed a certain amount. If it -- 4 if it exceeded a certain amount, then dividends 5 would not be paid. 6 BY MS. RIVERA: 7 Q. Okay. Then there were some questions 8 specific to a dividend that was paid in 2002 from 9 Roxane to BIC, I think, in the amount of \$320 10 million. Do you remember that? 11 A. Yes, I do. 12 Q. Okay. Were you able to determine why 13 that dividend payment was larger than dividend 14 payments that had been paid in the past, that Mr. 15 Fauci also referred you to? 16 A. Yes. There was a couple of things that 17 happened in the prior year that -- that resulted in 18 larger -- more income for Roxane. First, we sold 19 the palliative care business, so the income was -- 20 the income that Roxane reported in 2001 was a lot 21 larger than had been expected; two, there were some 22 tax issues pending that allowed us -- that was</p>
<p style="text-align: right;">195</p> <p>1 MS. POLLACK: Objection as to form. 2 MS. RIVERA: I'm not done yet. 3 MS. POLLACK: Sorry. 4 MS. RIVERA: It's okay. 5 BY MS. RIVERA: 6 Q. To pay its day-to-day expenses and fund 7 its day-to-day operations from 1996 through 2005? 8 MS. POLLACK: Objection to form. 9 BY THE WITNESS: 10 A. Yes. 11 BY MS. RIVERA: 12 Q. Okay. And this is your view even though 13 at certain points of time Roxane paid dividends to 14 its parent comp -- corporation? 15 A. Yes. 16 Q. Okay. Do you have any understanding 17 whether the capitalization and Roxane's ability to 18 pay and fund its -- its day-to-day operations was 19 taken into account when determining whether 20 dividends should be paid to -- to BIC or not? 21 MR. FAUCI: Objection. 22 BY THE WITNESS:</p>	<p style="text-align: right;">197</p> <p>1 gonna allow us to pay some additional dividends; 2 and, three, we hadn't paid a dividend in -- since 3 2000, so this -- the payment in 2002 was -- was a 4 catch-up for a two-year period. 5 Q. Okay. 6 (WHEREUPON, a certain document was 7 marked Exhibit McIntyre 028, for identification.) 8 BY MS. RIVERA: 9 Q. Okay. Okay. The court reporter has 10 handed you what's been marked as Exhibit 28. Can 11 you tell me what this is? 12 A. This is the 2001 year-end financial 13 commentary or commentary to the financial 14 statements. 15 Q. Okay. Are these documents that Roxane 16 generates in its normal course of business, or did 17 at this point in time? 18 A. Yes. 19 Q. And you're familiar with these kinds of 20 documents? 21 A. Yes. 22 Q. Okay.</p>

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<p style="text-align: right;">198</p> <p>1 MR. FAUCI: Objection to form. 2 BY MS. RIVERA: 3 Q. If you would turn to the page that ends - 4 - if you see the BOEH numbers there -- 5 A. Uh-huh. 6 Q. -- that ends in 452, it's a -- it's right 7 -- it's a commentary right after the income 8 statement. 9 A. Total company income statement, right? 10 Q. Yes. 11 A. Yes, okay. I have it. 12 Q. Okay. And it says, "2001 actual income 13 is 175 million," and it says under that, attribute 14 -- "Attributable to the Elan deal for the purchase 15 of pain/palliative care products line." Can you 16 tell me what that means in terms of how much Roxane 17 was paid for its divestment of the Elan palliative 18 care line? 19 A. That -- well, this -- this would 20 represent the amount of income that they were made 21 -- made on this sale of the -- the line. 22 Q. Okay. So is that the same as saying that</p>	<p style="text-align: right;">200</p> <p>1 MR. FAUCI: Objection -- 2 BY THE WITNESS: 3 A. -- correct. 4 MR. FAUCI: -- to the form. 5 BY MS. RIVERA: 6 Q. Okay. 7 A. That is correct. 8 Q. Were you able to determine, Mr. McIntyre, 9 whether the payment of the \$320 million dividend in 10 2002 had anything to do with pending subpoenas or 11 litigation at Roxane? 12 MR. FAUCI: Objection to the form. 13 BY THE WITNESS: 14 A. Yes, I was able to determine from 15 conversations with Frank Palmer that it had nothing 16 to do with any litigation. 17 BY MS. RIVERA: 18 Q. Okay. Okay. Just a few general 19 questions. Between the time you were in Roxane's 20 financial department, between 1996 and 2005, did 21 you view Roxane as a separate company from BIC and 22 BIPI?</p>
<p style="text-align: right;">199</p> <p>1 Roxane made \$175 million from the divestiture of 2 the Elan products? 3 A. Yes. 4 MR. FAUCI: Objection to form. 5 BY MS. RIVERA: 6 Q. I mean the divestiture of the products to 7 -- to Elan. 8 A. Yes. 9 Q. Okay. And can you tell from your 10 knowledge and from your review of the documents 11 whether that income was budgeted for in -- for 12 Roxane for 2001? 13 A. I could -- yes, it was -- it was not 14 budgeted for. 15 Q. Okay. So is this consistent with your 16 testimony that in 2001 Roxane had a unbudgeted 17 influx of income in the amount of \$175 million? 18 A. Yes. 19 Q. Okay. And that contributed in part to 20 the reason why the 2002 dividend payment was 21 higher? 22 A. That would be --</p>	<p style="text-align: right;">201</p> <p>1 MR. FAUCI: Objection -- 2 BY THE WITNESS: 3 A. Yes. 4 MS. RIVERA: -- to the form. 5 BY THE WITNESS: 6 A. Yes. 7 MS. RIVERA: What's your objection? 8 MR. FAUCI: It calls for a legal 9 conclusion. 10 BY MS. RIVERA: 11 Q. Okay. In your view, was Roxane a 12 separate company from BIC and BIPI? 13 MR. FAUCI: Same objection. 14 BY THE WITNESS: 15 A. Yes, they were a separate legal entity. 16 BY MS. RIVERA: 17 Q. Okay. And following the reorganization 18 in 2005, was it your opinion that BIRI was a 19 separate -- or did you consider BIRI a separate 20 company from BIC, BIPI and RLI at that point? 21 A. Yes, it was -- again, it was a separate 22 legal entity, separate tax ID.</p>

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